

Arsouze (Migration) [2019] AATA 2730 (15 May 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Chloe Arsouze
CASE NUMBER:	1716094
DIBP REFERENCE(S):	CLF2013/260567
MEMBER:	Russell Matheson
DATE:	15 May 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221c) of Schedule 2 to the Regulations; and • r.2.03A.

Statement made on 15 May 2019 at 8:06am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine de facto relationship – credible witnesses – joint accounts – sharing of day to day expenses – pooling of funds – living together at sponsor’s family home – duration of the relationship – nominating each other as beneficiaries of superannuation and wills – travelled overseas together on numerous occasions – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65

Migration Regulations 1994 (Cth), rr 1.09A, 2.03A; Schedule 2, cl 801.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 20 July 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant is a 32 year-old female national of France. She applied for the visa on 18 October 2013 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied the applicant was the de facto partner of the sponsor. The applicant seeks review of the delegate decision.
5. The applicant appeared before the Tribunal on 14 May 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor's parents and brother.
6. The applicant was represented in relation to the review by her registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5CB of the Act.
9. The Tribunal has before it the Department of Immigration's file relating to the applicant; its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
10. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.

Whether the parties are in a spouse or de facto relationship

11. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen and was identified in the related Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

Are the parties in a de facto relationship?

12. De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual

commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

13. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
14. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the de facto partner of the sponsor within the meaning of s.5CB of the Act. Below the Tribunal sets out its consideration of the evidence under the relevant aspects of the matters it must take into consideration under r.1.09A(3), and the reasons for its decision.
15. The Tribunal had the benefit of the applicant's, the sponsor's and three witnesses' oral evidence at the hearing and found their evidence to be detailed, consistent and, overall, credible. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and evidence provided by the applicant to the Department and the Tribunal file due regard. The applicant provided a significant amount of additional documentary and photographic evidence to the Tribunal.
16. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing, particularly in regard to the applicant failing to respond to requests from the Department to provide further information in regard to her visa application. The Tribunal is satisfied that the parties were credible witnesses.

17. Financial aspects

18. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses.
19. The parties provided documentary evidence that they have joint accounts with Westpac, such as a Westpac E-Saver account, Westpac Choice account and Westpac Altitude Qantas Black Card. The parties provided electronic statements for all accounts covering periods but not limited to 2 January 2014 to 31 July 2018. The parties gave evidence that they deposit both their wages into their joint account and manage all payments from that account and this is indicated in the statements provided. The parties provided evidence of joint debit and credit cards linked to their accounts. The applicant and sponsor stated that the joint account is utilised for payments to their credit card, their day-to-day living expenses such as groceries, dining, transportation, household purchases, holidays, social occasions, gifts for family and friends, contributions to the utility bills and rent payments paid directly to the sponsor's parents. The sponsor stated that he received an inheritance in 2016 and deposited the money into the parties' joint account because he views the money as the couple's money and they are saving to purchase their own home. The Tribunal notes the parties have been living together at the sponsor's family home with his parents.
20. The Tribunal accepts that the parties share and pool their financial resources. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in

respect of the other. There is extensive evidence before the Tribunal to support that the parties share the day-to-day living expenses. The Tribunal places significant weight on this aspect of the relationship.

21. Nature of the household

22. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.
23. The couple gave detailed and consistent evidence about their living arrangements and the Tribunal found them persuasive and genuine. The Tribunal is satisfied that they live together. The applicant and the sponsor spoke about sharing household duties, responsibilities and individual tasks in detail and provided a number of receipts in joint names for household purchases for their current address. They provided consistent evidence of their living arrangements and details about their daily lives, employment, health, travel activities together and completing household renovations themselves at their current address.
24. Tribunal accepts the parties live together and that they have established a joint household. The Tribunal is satisfied that they share the household duties and responsibilities.

25. Social aspects

26. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
27. The Tribunal accepts that the relationship is socially recognised by family and friends. There are several statements (Form 888) from third parties who express their view that the relationship is a genuine and continuing one. Overall, the statements give a strong insight into the inception and development of the relationship over a lengthy period of time. In oral evidence, the couple outlined in detail their social activities and their involvement with family and friends, travel overseas and weekends away together and attending significant events such as weddings and birthday parties. The parties provided documentary evidence of their overseas and domestic travel and accommodation but not limited to; places such as: Kuala Lumpur, Mexico, Cuba, Los Angeles, Sri Lanka, Vietnam, Melbourne and the south coast of New South Wales.
28. The Tribunal is satisfied they plan and undertake joint social activities and represent themselves to others as being married to each other. The Tribunal accepts that the parties' family and friends believe they are in a genuine and continuing spousal relationship. The Tribunal is satisfied that there is strong family support for the relationship.

29. Commitment

30. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
31. The parties claim to have met in September 2012 through mutual friends and a relationship developed in the ensuing months and they moved in together in the early stages of their relationship living with the sponsor's parents in Avalon. To date, the parties have been living together for a period of time exceeding six years. The parties registered their de facto

relationship in NSW in June 2013. The applicant and sponsor are currently engaged to be married.

32. The applicant and sponsor both stated that they have a joint Westpac account and are saving to purchase their own home and start a family. They further stated that they are currently living together in a two bedroom 'apartment' located on the first floor of the sponsor's parents' house and are looking forward to purchasing their own home and sharing the rest of their lives together.
33. The applicant and sponsor provided detailed and consistent evidence of the parties' life together and their belief that they are in a long-term relationship. The parties provided evidence of nominating each other as beneficiaries of their superannuation and wills. They further stated that they are currently saving to purchase their own home together and have made enquiries with Westpac/mortgage brokers to obtain a loan. The parties stated that they were planning to have a family together when they were financially secure and living independently as a couple. The parties expressed their love for each other and their love of travelling together and future aspirations. The Tribunal notes that they have travelled overseas together on numerous occasions. The parties provided persuasive oral and documentary evidence of being in a genuine and continuing relationship.
34. The applicant and sponsor provided detailed evidence regarding their love, care and moral support of each other during the good times and bad times, particularly in relation to tragic events that had occurred in their lives that impacted on their families. The parties provided strong evidence of each other's attributes indicating they are in a loving and caring long-term relationship.
35. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long-term one. The Tribunal considers their evidence with regard to their commitment to each other very credible, persuasive and genuine.
36. The Tribunal is satisfied the applicant and the sponsor derive a strong degree of companionship and emotional support from each other that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long-term one.
37. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is a genuine and continuing relationship and that they do not live separately and apart on a permanent basis.

38. Findings

39. Having considered all aspects of the relationship, the Tribunal is satisfied that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together. Given these findings the Tribunal is satisfied that at the time of this decision, the parties are in a spousal relationship.
40. Given these findings the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of this decision.
41. Therefore the applicant meets cl.801.221(2)(c).

Are the additional criteria for a de facto relationship met?

42. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
43. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
44. The applicant has provided evidence that the relationship is registered under the *Births, Deaths and Marriages Registration Act 1995* in the state of New South Wales on 10 June July 2013 as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). Accordingly, the 12 month requirement does not apply.
45. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
46. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

47. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl.801.221(2)(c) of Schedule 2 to the Regulations; and
 - r.2.03A.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).